

2005 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION NEGOTIATION COMPETITION FACT PATTERN

In the mountains surrounding Southern California, half a dozen ski resorts rise above Lake Bear Foot among the large pines of the San Tope National Forest. The oldest and largest resort, Mujera Blanca, is owned by octogenarian industry legend Reed Gregory and run day-to-day by his young wife and company president, Claudia Magnani. Both Gregory and Magnani have been active in libertarian causes and oppose government regulations of any kind, particularly environmental regulation of business. Not surprisingly, the Mujera Blanca Ski Resort has had run-ins with the County of San Tope Environment Department as well as the California Regional Water Quality Control Board, each of which inspect the site regularly.

In addition, Gregory and Mujera Blanca have engaged in a decades long battle with multimillionaire environmental gadfly Brett Sullivan. Sullivan believes that Gregory, Magnani, and Mujera Blanca have harmed the lake, the forest, and the overall environment of the mountain. Sullivan has also clashed with San Tope County, which he believes has failed to ensure Mujera Blanca's compliance with permit requirements and environmental laws despite blatant violations. Sullivan formed and funds the organization San Tope Opposes Plundering, or STOP. Sullivan has pursued different tactics over the years from protests and law suits to allegedly placing red dye in Mujera Blanca's snow making machines, resulting in slopes covered with pink snow.

Most recently, STOP filed a multi-count law suit for unfair and unlawful business practices under California Business and Professions Code §17200 for violations of various permit requirements, Water Code and Public Resources Code provisions, and for violations of County Ordinances. The suit names the Mujera Blanca Ski Resort and Gregory and Magnani personally, and seeks injunctive relief, restitution/disgorgement, and attorneys fees. Gregory fired back by filing suit against Sullivan and STOP, contending that statements by a STOP member at a Regional Water Board hearing concerning Mujera Blanca's waste discharge permit, in which he stated that "Claudia Magnani cares more about her latest face lift and cellulite vacuum than the health of Bear Foot Lake," constituted defamation and interference with business advantage. Sullivan and STOP have moved to dismiss the Gregory suit under California anti-SLAPP statute, Cal. Civ. Pro. Code §§ 425.16 et seq., and appear to have a good chance of prevailing. *See, e.g., Wilcox v. Superior Court*, 27 Cal.App.4th 809 (1994).

Meanwhile, the County has become concerned that the increasingly vitriolic dispute between Sullivan and Gregory is impacting the financial health of the County and that it is losing control over the Ski Resort. Sullivan has been effective in organizing boycotts of Mujera Blanca as well as protests along the access roads to the resort. The Environment Department believes that Mujera Blanca is becoming less cooperative and more willing to ignore directives, orders, and requirements of the regulatory agencies. As a result, the San Tope County District Attorney has intervened in the STOP law suit, and has added a demand for penalties under Business and Professions Code § 17206, which only the DA or the Attorney General (as opposed to a private party) may recover as well as claims under Fish and Game Code § 5650.

STOP, and now the DA, make the following allegations against Gregory, Magnani, and the

Mujera Blanca Ski Resort:

Illegal Construction and Tree Removal. STOP and the DA allege that on numerous occasions Mujera Blanca has altered the topography and vegetation of the mountain, increasing erosion and sedimentation in an already overburdened river and creek system that drains the mountain into the lake. In fact, U.S. EPA has listed the Mujera Creek and the San Tope River as among the nation's most polluted waterways as the result of sedimentation. In order to complete the construction and removal projects legally, Mujera Blanca was required to apply for and obtain various permits, authorizations, and waivers from San Tope County and the Regional Water Board. In a series of actions, STOP and the DA allege that Mujera Blanca either failed to obtain permits and authorizations or ignored the requirements when Mujera Blanca did obtain them. These are the most serious allegations.

1. Godzilla Gondola. STOP and the DA allege that Mujera Blanca's actions in replacing an existing ski lift with a high speed/high wind gondola system violated a series of permits and project descriptions, envisioning a project involving minimal disturbance to terrain and vegetation. In fact, STOP and the DA allege, the project resulted in dynamite blasting, excavation of thousands of yards of material, reshaping of a ridge, tree cutting, and burying of vegetation. Sediment was released in large quantities near and into the Mujera Creek.

2. Bambi Express Lift Construction. STOP and the DA allege that Mujera Blanca, during construction of this lift system altered two drainage channels in violation of the relevant permits, resulting in discharge of sediment to surface waters, potentially impacting the Mujera Creek.

3. Megalon Pond and Wetlands. Some years ago, Mujera Blanca expanded a pond at the base of its operations for irrigation purposes by destroying wetlands not identified in the permit. When it was discovered, the County required Mujera Blanca to complete an extensive mitigation project restoring wetlands. Mujera Blanca never finished the project.

4. T. Rex Ski Zone. Despite substantial opposition, Mujera Blanca obtained permits to open an additional area of the mountain for skiing. STOP and the DA allege that Mujera Blanca, fearing lawsuits that might halt the development, began cutting trees ahead of the schedule identified in the Timber Conversion Permit issued by the Department of Forestry. Mujera Blanca cut over 1000 trees, some over 500 years old. Mujera Blanca attempted to sell the timber, but did not proceed with the sale when STOP protested.

Legal Claims. STOP and the DA allege violations of Business and Professions Code §§ 17200 et seq. for unlawful business practices. B&P 17200 actions usually involve "predicate acts," violations of other laws that form the basis of the B&P 17200 violations. *See, e.g., Pines v. Tomson*, 160 Cal.App.3d 370 (1984). This is such a case. The DA has also added allegations of illegal discharge of water pollutant under Fish and Game Code § 5650. STOP and the DA allege a number of violations as predicate acts, including the specific terms of permits and county ordinances. The strongest claims, are as follows:

1. Godzilla Gondola and Bambi Express Lift Construction. San Tope County issued grading and erosion permits to Mujera Blanca based on Mujera Blanca's description of the proposed projects. The descriptions did not mention dynamite blasting, tree removal, drainage channel modification, or removal of thousands of yards of sediment. STOP alleges violations of Fish and Game Code § 5650 as B&P 17200 predicates, and the DA alleges them directly, for release of sediment to waters of the state, deleterious to fish. An updated grading profile, submitted by Mujera Blanca after the work was approved and begun shows 18,000 cubic yards of displacement, which appears to support the legal claim. All parties have a copy of that grading profile.

2. Megalon Pond and Wetlands. The County and Mujera Blanca signed an agreement requiring Mujera Blanca to complete the wetlands projects. The alleged violation of the agreement constitutes the B&P 17200 predicate.

3. T. Rex Ski Zone. STOP and the DA allege that Mujera Blanca violated the Forest Practices Act, Public Resources Code § 4511 et seq. by failing to obtain a timber harvesting plan for sale of timber and for violation of the timber conversion plan by cutting before the authorization date of that plan.

Not surprisingly, Gregory and Mujera Blanca have responses to the allegations.

1. Godzilla Gondola. Mujera Blanca does not deny that it blasted or that it generated more earthen material than originally anticipated. Gregory and his company argue that the changes were within the latitude of the Grading Plan and that not much of the sediment entered the Creek. Gregory admits that the Grading Plan states that displacement will be 4000 cubic yards (about one eighth of the actual), but contends that the updated grading profile, shows the area to be removed, clearly more than 4000 cubic yards, placing all on notice, just after the removal began on the ground.

2. Bambi Express Lift Construction. Mujera Blanca acknowledges alteration of the drainage channels, but disputes that any discharge impacted the Creek.

3. Megalon Pond and Wetlands. Mujera Blanca contends that it has completed 90% of the restoration project, that it has been delayed because of its contractor and that the County had a chance to cash a completion bond on the project based on the failure to complete 100% of the project, but failed to do so, leaving no further remedy.

4. T. Rex Ski Zone. Mujera Blanca contends that no timber harvesting plan was needed because no timber was actually sold and that it fully complied with its timber conversion plan requirements except that it moved up the date of its actions by one week because of contractor availability.

As much as he dislikes the idea of negotiating with the DA, Gregory realizes that if he does not resolve matters with the County, he runs the risk of substantial sanctions and operating restrictions. Worse yet, if he cannot reach some sort of accommodation with STOP and Sullivan (as

well as the DA), his ski resort may run into financial problems because of the boycott. Grudgingly, he has therefore agreed to meet initially with the DA to see if he can strike a deal. If he can get somewhere with the DA, he will meet with representatives of STOP, as long as Sullivan does not attend in person. Therefore, there will be two separate negotiations, first between the County DA and Gregory/Mujera Blanca(Round 1), and second, between Gregory/Mujera Blanca and the STOP (Round 2).¹

Round 1 (DA and Gregory/Mujera Blanca)

The parties have narrowed the discussion to the following issues.

1. Creek, Wetlands, and Forest Restoration

The DA has made it clear that any settlement must include restoration projects for the Creek, Wetlands, and the Forest. The main issues here concern the location of the restoration projects (and whether they will impact the ski resort directly) and the cost. Projects include:

- a) completion of wetlands restoration;
- b) re-forestation in conjunction with US Forest Service; and
- c) sediment controls to protect the creek

2. Monitoring and Compliance

The DA has expressed the view that she is tired of Gregory' and Mujera Blanca's recidivism. She insists on a comprehensive monitoring and enforcement system. Gregory, the libertarian, despises this idea. This will be a difficult area to resolve.

3. Penalties and Disgorgement

Under B&P § 17206, penalties are \$2500 per violation, and \$25,000 per violation under Fish and Game Code § 5650.1. The DA will argue that the cutting of each tree and the attempted sale of each tree is a separate violation. The other violations are pretty clearly limited in number. The DA contends that she can obtain restitution and disgorgement under B&P 17200, and that those measures are substantial because she can establish damage to the environment as well as

¹STOP's and the DA's interests are not necessarily aligned on all issues. It is therefore certain that the DA and STOP would have different counsel in this matter. For purposes of this exercise, however, counsel will represent the DA in the first round and STOP in the second round, without reference to any ethical dilemmas.

substantially increased profits from installation of the new lifts and ski area. Gregory and Mujera Blanca question the DA's ability to recover either restitution or disgorgement under section 17200. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003); and *Kraus v. Trinity Management Services*, 23 Cal.4th 116 (2000) (limiting restitution and disgorgement recovery under certain circumstances). Resolution of this issue is tied to issue one, because it is, at heart, a monetary issue.

The DA will present the opening proposal.

Round 2 (Sullivan/Mujera Blanca)

(For purposes of this negotiation, assume that the DA and Gregory/Mujera Blanca have reached agreement on most issues, but that the DA insists that Gregory reach agreement with STOP on the remaining matters in order to secure a universal resolution of the case).

The DA has made it clear to all parties that any settlement with the DA is contingent on resolution of the three issues listed below. Gregory hates the idea of resolving anything through negotiation with Sullivan, but recognizes that the risk of going to trial against the DA is substantial.

Sullivan would like to litigate as well, but the DA could push Sullivan out of the case entirely if she wanted to take over the entire B&P 17200 action, as she has threatened to do. While the DA cannot preempt citizen suits under section 17200, she can, under the statute and case law, relegate the citizen's suit to a minor role. In addition, in light of the recent passage of Proposition 64, Sullivan and STOP will likely have to establish specific harm to property for their case to proceed, potentially a difficult endeavor without the DA's support. Sullivan has a fair amount at stake in this fight, and would like to be able to declare a victory in his on-going battles with Gregory.

1. Inventory and Mapping

STOP seeks a full three dimensional GIS (Geographic Information Systems) mapping of the ski resort, including all aspects of the terrain, vegetation, water ways, and drainage. See, e.g., www.gis.com, for details about GIS mapping. Gregory sees this as an invasion of privacy, but understands that he must provide some of this information because the DA strongly supports STOP on this item.

2. Attorney's Fees

STOP and Sullivan seek attorney's fees based on the theory that under Civ. Pro. Code § 1021.5 they acted as a "private attorney general," as well as under the anti-SLAPP law. Because this is a settlement negotiation, the parties can agree to attorney fees regardless of the specific application of the statute, but Gregory contends that STOP and Sullivan are not eligible for attorney's fees under section 1021.5 because the DA is involved in the case. Gregory hates the idea of giving Sullivan money.

3. Monitoring and Enforcement

STOP wants to participate in monitoring and enforcement at Mujera Blanca. To Gregory, this is worse than County monitoring. If the DA had not insisted, Gregory would not even consider

this.

Gregory will present a proposal on all issues to open negotiations.